82-2077

No. ....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah corporation,
Petitioners,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., NORLIN MUSIC, INC., formerly CHICAGO MUSICAL INSTRUMENTS, and PEAVEY ELECTRONICS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a plaintiff who has submitted substantial evidence on the anti-competitive affect of the defendants conduct as an exception to the manufacturer's normal distribution system coexisting with a proven illegal conspiracy entitled to have the defendants answer his evidence or should defendants be allowed to avoid responding by virture of a 41(b) Motion?

2. Is unfair competition actionable under the antitrust laws as an inseparable part of the federal question of conspiracy when it was in furtherance of per se

illegal combination, and is the trial court required to make findings of facts on the issues of unfair competition and award separate damages for the injuries suffered or can such issues be dismissed in silence?

3. Is a plaintiff who has presented a reasonable damage theory supported by expert testimony and demonstratable economic evidence entitled to receive that measure of his damages or can the damages be reduced by admitted speculation?

4. Will a private litigants proof of a violation of Section I of the Sherman Act merge with claims of Section II violations, or is it proper to dismiss the Section II claims by separating the evidence of the proven Section I violations when considering Section II claims?

DESIGATION OF CORPORATE RELATIONSHIPS

The Guitar City Studios, Inc. filing this petition for Writ of Certiorari to the Tenth Circuit Court states that:

1. This is its original designation of corporation;

2. Guitar City Studios, Inc. is not owned by any present corporation;

3. Guitar City Studios, Inc. does not have an ownership interest in any subsidiaries;

4. Guitar City Studios, Inc. does not have any affiliates.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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To the Honorable Warren Burger, Chief Justice of the Supreme Court and the Honorable Justices of the Supreme Court of the United States.

The above-named petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment in the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause affirming the judgment of the United States District Court for the District of Utah, which was entered in said Court of Appeals in Case No. 82-1357 and 82-1400 on March 8, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals that was entered on March 8, 1983, is unreported at the date of the printing of this petition, but is reproduced in Appendix A. The opinion of the United States District Court for the District of Utah is reported at 1982-2 Trade Cases 64,928 (D. Utah, 1981) and is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on March 8, 1983, and has not been reported as of the date of the printing of this petition. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). On June 3, 1983, time for filing was extended to June 29, 1983 (A-968).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This petition involves the following constitutional provisions, statutes and Federal Rules of Civil Procedure:

1. The 5th Amendment to the Constitution of the United States.

2. The 14th Amendment to the Constitution of the United States.

3. Sherman Act §§1 and 2 15 U.S.C. §§1 and 2.

4. Lanham Trade Mark Act §43(a) 15 U.S.C. §1125 (a).

5. 15 U.S.C. §1338 (b).

6. Rule 8(e)[2] Federal Rules of Civil Procedure.

7. Rule 41(b) Federal Rules of Civil Procedure.

8. Rule 52(a) Federal Rules of Civil Procedure.

which are reproduced in Appendix C.

STATEMENT OF THE CASE

The petitioners sued the respondents and others under §§1 and 2 of the Sherman Act 15 U.S.C. §§1 and 2 (hereinafter the Sherman Act) seeking treble damages under §4 of the Clayton Act 15 U.S.C. 13(e).

This lawsuit arises out of factual situations including price-fixing, boycott, refusals to deal to protect the price-fix, and unfair competition.

The purpose of the conspiracy was to protect Progressive's price-fix and to destroy competition in the state of Utah in the line of musical equipment known as Frets Electronics and Percussion (hereinafter (FEP). This purpose was accomplished by Progressive conspiring with the defendant manufacturers to boycott Olsen and other dealers, refusing to deal with Olsen and other dealers to protect the price-fix, engaging in acts of territorialization trade name infringement and other acts of unfair competition driving all other competitors out of the business in order to protect the price-fix specifically proven as to CBS Instruments.

The acts of unfair competition included trade name infringement, inducement of the petitioner's employees to work for the defendant Progressive in the price-fix, the taking over of the petitioner's store locations and

customers, the unauthorized use of petitioner's trade name secrets (copyrighted music), and the transfer of franchises.

During the time the conspiracy was in effect, there was little or no competition with the CBS complete line of quality instruments.

Named as defendants in petitioner's complaint and amended complaint are Progressive Music Supply, Inc. (hereinafter Progressive); Accoustic Control Corp. (hereinafter Accoustic); Ovation Instruments, Inc., a/k/a Kaman Corp., Norlin Music Inc., formerly Chicago Musical Instruments (hereinafter (Norlin); CBS Musical Instruments (a division of CBS, Inc.), (hereinafter CBS); ARP Instruments (hereinafter ARP); and Peavey Electronics Corporation (hereinafter Peavey).

The claims against ARP and CBS have been dismissed. Also, Judge Anderson, the trial judge, granted several of the defendants' motions to dismiss on behalf of claims against Norlin, Ovation, and Peavey. Petitioner's Section 2 Sherman Act claims against Progressive involving attempt and conspiracy to monopolize were also dismissed. All claims against Accoustic and Ovation were dismissed prior to appeal leaving defendants, Norlin, Peavey and Progressive in the appeal.

The trial Court found that Progressive had conspired with CBS and others to restrain trade by fixing prices in violation of the Sherman Act, but that Olsen as a direct horizontal competitor suffered no injury as a result of this conspiracy. The Court also found that Progresive had violated Section 1 of the Sherman Act

by conspiring to boycott Olsen from receiving CBS products awarding damages of $4,303.00, before trebling, plus attorney's fees.

The Appellate Court affirmed all of the trial courts findings.

A new cause of action against CBS arising from continuation of the same claims awaits decision at the 10th Circuit Court, No. 82-2398.

In 1964, Petitioner Clair Olsen (hereinafter Olsen) along with George Best and Earl Reed formed Guitars, Inc., using the trade name Guitar City Studios. The business was started by purchasing from Bud Eastman his going profitable business including the franchises of CBS, Chicago Music Instruments (now Norlin, Inc.) and Gretch Musical Instruments.

Prior to purchasing the above-mentioned franchises, Olsen had agreements that each of the manufacturers would deal. However, after the purchase was completed CBS refused to deal with petitioner. Olsen proved at the trial that the CBS's refusal to deal was to protect the price-fix.

The three principals of Guitar, Inc., Olsen, Best and Reed, operated separate stores on a part-time basis. However, they had entered into a written contract that when the gross sales reached $50,000.00 per year they would all work full-time. The $50,000.00 condition was never met because of the proven conspiracy.

In 1970, disagreements arose between the principals of Guitars, Inc., because none could earn a living while the conspiracy was in effect. This caused a separation

of the principals to operate independent stores, retaining the corporate form for administrative purposes.

During the time the conspiracy was in effect, Progressive Music was the largest combo and electronic instrument dealer in Utah dealing with all the independent manufacturers, exclusively with ARP, Accoustic, CBS, Peavey and on some products with Norlin.

In 1974, Olsen began to operate his store full-time when equipment to compete with the CBS complete line came into the market. From 1974 to 1978, Olsen's business grew from seven percent (7%) of the size of Progressive's business to seventy percent (70%). The proven demonstratable economic affect of the consipracy continued in effect until at least 1976. The Trial Court refused to receive any evidence of damages past 1974 and adopted 1975 as the base year to calculate damages.

REASONS FOR GRANTING THE WRIT

The most important reason for granting the writ is that the decision of the Court of Appeals is contrary to the letter and spirit of the antitrust laws, the Federal Rules of Civil Procedure, and the basic principles of modern federal practice articulated by this Court, and the majority of other Circuits. The area of dispute involves basic questions of fundamental rights guaranteed by the constitution, antitrust laws, and federal civil procedure of which the Tenth Circuit is in conflict with the decisions of the U. S. Supreme Court and many of the Circuits. This subject has importance to the antitrust practitioner and to this Court

in its capacity as overseer of the administration of justice in the federal court system.

SUMMARY OF THE ARGUMENT

Petitioners Argument will focus on the four questions presented. In the first part of the Argument Petitioner will discuss the propriety of the lower court's dismissing the Defendant manufacturers Norlin and Peavey, pursuant to Rule 41(b) in lieu of the evidence showing the anticompetitive effects of the exception to their normal distribution systems.

Next, Petitoner will focus on the impropriety of the lower court's dismissing in silence the unfair competition claims after commenting that they did impact unfairly on the Petitioner.

Next, Petitioner will focus on the impropriety of the lower court's reducing the damages by mere speculation. Petitioners will then conclude by discussing the Trial Court dismissing the §2 claims.

ARGUMENT

POINT I

THE CIRCUIT COURT ERRED IN AFFIRMING THE DISMISSAL OF PEAVEY AND NORLIN.

The Circuit Court's decision in this case is in conflict with this Court's holding in *Klors v. Broadway Hale Stores*, 359 U.S. 207 (1959); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) and *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). Also, the decision is in conflict with the Fifth Circuit

in *Cadillac Overall Supply Co. v. United States*, 568 F. 2d 1078 (5th Cir. 1978), as well as with its own holding in *Morton Salt Co. v. Royal Crystal Salt Co.*, 235 F. 2nd 573 (10th Cir. 1956).

The decision in this case is at odds with the above-mentioned cases in three areas. First, the petitioner proved a group boycott under *Klors, supra*, and the court erred in dismissing Norlin and Peavey pursuant to a 41(b) Motion. Second, petitioner further proved that the refusals to deal by Peavey and Norlin to grant Progressive an exclusive dealing, had an anticompetitive effect in the market as required under *GTE Sylvania, supra*, rule of reason analysis and therefore it was improper to dismiss Norlin and Peavey on a 41(b) Motion. Third, the court's dismissal of Norlin and Peavey dismembered the conspiracy contrary to this Court's holding in *Continental Ore, supra*. Each of the above-mentioned areas will be discussed separately.

A. GROUP BOYCOTT UNDER *KLORS, SUPRA*

In *Klors, supra*, that court held that an agreement between a retailer and various manufacturers to exclude a horizontal competitor from receiving certain products constituted a group boycott that was a per se violation of the antitrust laws. This court noted in *Klors* that the alleged conduct was: "not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers distributors and a retailer." Id. at 210. The court goes on to state that the combination took away *Klors*' freedom to buy products in "an open competitive market." Id.

Like *Klors, supra,* the Petitioner alleged the same type of conspiracy between a retailer and the various manufacturers. At trial, the Petitioner submitted the following evidence establishing the parallel conduct of the conspiracy which should have precluded the granting of Norlin and Peavey's 41(b) Motion.

The evidence showed that Progressive was the largest retailer of FEP in the State of Utah. See, T. Ex. P-103, Penman Depo. p. 29. Progressive's business policy was to be protected from price competition. See, undisputed testimony T. April 30, 1979, p. 22. The protection from price competition was achieved by Progressive's policy of seeking and obtaining exclusive dealing agreements with manufacturers Penman Depo. p. 85 and by cornering the best lines in the trade T. May 21, 1979, pp. 111-114, to sell at noncompetitive price. T. Vol. II, p. 249.

Norlin participated in the conspiracy in the following manner: It created an exception to its normal distribution system by granting to Progressive an exclusive on its synthesizers, Pearl Drum products and electronic keyboards, in the State of Utah T. Ex. P. 87, 88 and 89, allowing Progressive to sell them at noncompetitive prices above retail.

Norlin eliminated all the competitors on its Pearl Drum products by refusing to sell to Petitioners and other dealers, even though Norlin's own business records show that Petitioners were authorized to purchase the drums. See T. Exp. p. 87, 88 and 89; A-12 and T. Vol. V p. 1190.

As mentioned above, Norlin created an exception to its normal distribution policy. The Sixth Circuit in

Com-Tel, Inc. v. DuKane Corporation, 669 F. 2d 404, (6th Cir. 1982), based on *GTE Sylvania, supra*, held that an exception to the normal distribution policy combined with an anticompetitive effect created a per se violation of the antitrust laws. Therefore, the fact that Norlin's exclusive with Progressive was an exception and anticompetitive would require a holding that Norlin had violated the antitrust laws.

Peavey participated in the conspiracy in the following manner: Peavey granted Progressive an exclusive to allow Progressive to fix high noncompetitive prices, Penman Depo. pp. 67 and 109. Peavey would not make independent decisions to deal but, gave the name to Progressive to control the price-fixing, Penman Depo. pp. 88-89.

Peavey agreed with Progressive to stop national advertising of lower prices so that Progressive could maintain higher prices. See, T. April 30, 1979, p. 59, The exclusive between Peavey and Progressive was an exception to Peavey's normal distribution system. See, T. April 30, 1979, pp. 62-63. Like Norlin, this would require a per se violation pursuant to *Com-Tel, Inc., supra*.

The Petitioner proved that both Norlin and Peavey participated in the conspiracy in order to protect Progressive's price-fix. The Defendants have consistently tried to characterize their conduct as vertical restriction under *GTE Sylvania, supra*, requiring a rule of reason analysis. However, the clear weight of the evidence shows that the purpose of the restraints was to protect the Progressive price-fix. Therefore, under this Court's reasoning in *Klors, supra*, a per se standard

should have been applied requiring a finding that both Peavey and Norlin's parallel conduct established their participation in the group boycott.

B. PETITIONER MET ITS BURDEN UNDER *GTE SYLVANIA, SUPRA.*

Even if this Court rejects the per se argument stated above, the Circuit Court's decision is in conflict with this Court in *GTE Sylvania, supra.*

In *GTE Sylvania, supra,* this Court held that non-price vertical restriction were to be evaluated under the rule of reason standard. If the Court were to adopt the rule of reason standard then the Petitioner would have to prove the anticompetitive effect in the relevant market, *GTE Sylvania, supra.*

The demonstrable economic effect showed that both Peavey's and Norlin's exception to their normal distribution system produce an anticompetitive effect in that they eliminated competition in Utah while competition flourished in surrounding states as to Peavey, T. April 30, 1979, p. 62-63, T. Exp. p. 87, 88 and 89 as to Norlin. Progressive's prices were higher than in surrounding states, T. Exs. A-1, p. 96, and there was no business reason for the higher prices, they just raised prices to whatever they wanted, T. April 30, 1979, pp. 34-36.

As to proving the effect in a relevant market, the petitioner established the relevant market was professional instrument as opposed to amateur instrument. See, *Eastman Kodak Co. v. Southern Photo Material Co.*, at 273 U.S. 376 (1927). However, the lower courts rejected this classification implying that it was im-

proper. In this regard, the lower court is in conflict with *Eastman Kodak Co., supra,* in which this Court had no problem with such professional versus amateur classification. For the Trial Court to grant Norlin and Peavey's 41(b) Motion in the face of the demonstrable economic effect without requiring any evidence as to the reasonableness of the exception to their normal distribution policy or to even allow inquiry into what those policies were is to replace the rule of reason analysis with an assumption of reasonableness rule. Therefore, this Court should grant the Writ of Certiorari to review this aspect alone.

Furthermore, to allow the dismissal of Norlin and Peavey pursuant to a 41(b) Motion, the Court "must consider the evidence in its strongest light in favor of the party against whom the Motion for a directed verdict is made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." *Continental Ore, supra.*

C. DISMEMBERING THE CONSPIRACY.

In this case, the Petitioner submitted evidence and the Court found that Progressive Music conspired to fix prices. Evidence was also submitted showing that both Norlin and Peavey joined in that conspiracy by refusing to deal with the Petitioners in order to protect the price-fix. The law is clear that it only takes a small amount of evidence to join a defendant to a proven conspiracy. *Cadillac Overall Supply, supra; Morton Salt Co., supra.*

Furthermore, by affirming the dismissal of Peavey and Norlin, the Circuit Court is in conflict with this Court's holding in *Continental Ore, supra.* In *Conti-*

nental Ore, supra, this Court held that the conspiracy should not be dismembered, but should be viewed as a whole. By dismissing Peavey and Norlin, the District Court dismembered the conspiracy which dismembering was affirmed by the Circuit Court in conflict with *Continental Ore, supra.*

ARGUMENT

POINT II

UNFAIR COMPETITION AND THE ANTITRUST LAWS

At trial the Petitioners presented evidence on several aspects of unfair competition in furtherance of a conspiracy violating the antitrust laws. The unfair competition consisted of infringement of exact trade name, inducement of employees to work for Defendants in the price-fixing conspiracy, the take-over of Petitioner's store locations, use of Petitioner's trade secrets (copyrighted music) and transfer of franchises. While the trial court commented that the trade name infringement impacted unfairly on the Petitioners' it dismissed the trade name infringement, along with other unfair competition issues in silence by failing to make any findings of fact on those issues.

The failure to make findings of fact is clearly erroneous pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and is reversible error. *Smith v. Dravo Corp.,* 208 F. 2d 388 (7th Cir. 1953). Citing controlling Supreme Court precedent.

The trial court's dismissal of the unfair competition issue in silence leaves one with uncertainty as to what

the court's intentions were concerning those aspects of the litigation. For the Circuit Court to follow suit by not addressing the issue only furthers the uncertainty.

The lower court's failure to address the unfair competition issue creates a strong impression that the courts considered the unfair competition issues either did not raise to the level of the federal question or they are not actionable for damages under the antitrust laws.

Like the District Court, the Circuit Court failed to address the issue of unfair competition. The Circuit Court's failure to specifically address the issue places it in conflict with the other circuits holding that a failure to make finding is reversible error. *Smith v. Dravo Corp., supra.*

Furthermore, the Circuit Court's failure to address the issue and in effect dismissing it again in silence, raises the uncertainty issue. The Petitioners will address the above mentioned uncertainty as follows:

A. ARE ACTS OF UNFAIR COMPETITION ACTIONABLE UNDER THE ANTITRUST LAWS?

If we are to assume that by dismissing in silence the trade name infringement and unfair competition the court was making a statement that those issues are not actionable under §1 of the Sherman Act. The Tenth Circuit Court has then stepped into the middle of the significant raging conflict between the circuits which then compels this Court to hear this case in order to resolve the dispute.

A review of the case law shows that two views have been adopted among the circuits that have decided the issue of unfair competition being actionable under the antitrust laws. First, the so-called "narrow view" followed in the Seventh Circuit that unfair competition is not actionable under the antitrust laws, *Norville v. Globe Oil and Refining Co.*, 303 F. 2d 281 (7th Cir. 1962) (affirming the dismissal of the complaint in alleging unfair competition as violation of §1 of the Sherman Act) and *Parmelee Transportation Co. v. Keeshin*, 292 F. 2d 794 (7th Cir. 1961) (finding no antitrust violation where various acts of unfair competition were engaged in, including the bribing of public officials). The second view, the so-called "broad view" followed by the First, Third and Fifth Circuits, and formerly the Tenth Circuit, that unfair competition is actionable for damages under the antitrust laws. See *Albert Pick Barth v. Mitchell Woodbury Corp.*, 57 F. 2d 96 (1st Cir.) *cert. denied*, 286 U.S. 552 (1932) (holding that conspiracies involving unfair trade practices establish a per se violation). *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879 (1st Cir. 1960); *Perrington Wholesale, Inc. v. Pioneer Dist. Co. of Kansas*, 353 F. 2d 613 (10th Cir. 1965); *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F. 2d 83 (5th Cir. 1978) and *Cherokee Laboratories, Inc. v. Rotary Drilling Services*, 383 F. 2d 97 (5th Cir. 1967).

All of the cases mentioned under the "broad view" hold that there is a cause of action under §1 of the Sherman Act for unfair competition. However, there still is some uncertainty and conflict between whether a per se standard is to be applied or rule of reason approach is to be used. See *Atlantic Heel Co. v. Allied*

Heel Co., supra, a First Circuit case as opposed to *Northwest Power Products, Inc. v. Omark Industries, Inc., supra,* a Fifth Circuit case.

In any event, the one thing that is clear is that there is a considerable amount of uncertainty and conflict between the circuits with little guidance from this Court as to whether or not unfair competition is actionable under the antitrust laws and as to what standards should be used. As pointed out in 18 Boston College Industrial and Commercial Law Review, p. 239 at 274:

> Pick Barth and its progeny, pro and con, have been with us for more than four decades. The courts have, however, failed to develop a sound and uniform approach to the issues raised by the cases, *to the contrary in many instances they have adopted rather arbitrary positions which are inconsistent with federal antitrust policy.*

(Emphasis added.) Also, as pointed out in *Northwest Power, supra*: "Even if we were to adopt the law of the forum state, the *cases defining unfair competition are likely to be in noticeable disarray.*" (Emphasis added.)

The controversy whether unfair competition is actionable under the anti-trust laws has not been resolved at the time of filing this appeal. See *J. McCarthy, Trade Marks and Unfair Competition,* Vol. 1 Pocket Supplement 1982 §§ 1-3, 1-9, and 1-14 and cases cited.

Due to the great uncertainty over the question whether unfair trade practices are actionable under the antitrust laws, it is imperative that this Court exercise its discretion and grant the Writ of Certiorari to

review the decision of the Circuit Court to solve the controversy. The following questions require this Court to render an answer:

1. Is unfair competition actionable in the Federal Court under the antitrust laws? If so, which standard should be applied?

2. Is there a federal law of unfair competition? If so, what is the extent of its jurisdiction?

3. Specifically with regard to the case above, is the infringement of a direct competitor's trade name in the furtherance of a proven per se illegal conspiracy actionable for damage? If so, what are the measures of damages and should the per se rule be applied to that issue?

B. ARE TRADE NAME INFRINGEMENTS AND UNFAIR COMPETITION AN INSEPARABLE PART OF THE FEDERAL QUESTION?

If we are to accept the Court's dismissal of this issue in silence, it leads to the conclusion that the lower courts felt that the trade name infringement and other unfair competition issues are not part of the federal question. The decision of the Circuit Court is clearly in conflict with this Court's holding in *Hurn v Oursler*, 289 U.S. 238 (1932) in 28 U.S.C. 1338(b) and *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926) cited in *Hurn, supra*, as to antitrust (which holds that the federal courts do have jurisdiction over unfair competition claims even after the federal claim has been dismissed), and also with the Circuit Court's

own holding in *Big "O" Tires v. Goodyear Tire & Rubber Co.*, 561 F. 2d 1365 (10th Cir. 1977).

Therefore, this Court should grant the Writ of Certiorari because it is clear that our Circuit Court is out of line with the rest of the federal courts.

C. DENIAL OF DUE PROCESS.

Furthermore, the Tenth Circuit's dismissal in silence of the unfair competition is a fundamental denial of due process to the Petitioner in this case. Federal Rules of Civil Procedure 8(e)(2) provides that Plaintiff is entitled to as many causes of action as he has. Federal Rules of Civil Procedure 52(a) provides that in cases tried by the Court, it is required that the Court make findings of facts and not dismiss the issues in silence.

In this case, Petitioner put forth evidence that the Respondent/Defendant Progressive Music infringed Petitioner's exact trade name as part of the conspiracy to violate the antitrust laws and to drive Petitioner out of business. It is well settled that infringement is actionable for damages even in cases of similarity of infringement. *Bluebell Refining Co. v. Frontier Refining Co.*, 213 F. 2d 354 (10th Cir. 1954). More recently the Tenth Circuit Court has also held that the Lanham Trade-Mark Act §43 (a) 15 U.S.A. §1125(a) protects even trade name infringement where there is not a registered trademark but only a common law trademark. In *Big "O" Tire Co. v. Goodyear Tire Co.*, 561 F. 2d 1365 (10th Cir. 1977), the law being clear that the trade name infringement is an actionable cause of damage. For the lower courts to dismiss the issue in silence by failing to make findings of fact on the issue

presents a clear question of the Petitioner being denied due process of law guaranteed by the Fifth and Fourteenth Amendments. Such denial of due process mandates that this Court should grant the Writ of Certiorari and reverse the Circuit and District Court's on that issue alone so that the substantial rights of Petitioner are protected. Otherwise, the rules, statutes and constitution become meaningless.

POINT III

DAMAGES WERE REDUCED BY SPECULATION.

The Circuit Court's calculation of damages is in conflict with this Court in *Zenith Radio Corporation v. Hazeltyne Research*, 395 U.S. 100 (1969); *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 261 (1946), and *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359 (1927) as well as with other circuits in *Flintkote Company v. Lysfjord*, 246 F. 2d. 368 (2d Cir. 1957), and *William Goldman Theaters, Inc. v. Lowe's, Inc.*, 164 F. 2d 1021 (3rd Cir.) *cer. denied*, 334 U.S. 811 (1946).

At trial, the Court concluded the Petitioners proved a reasonable damage theory based on market share, T. Ex. p. 248. Defendants presented a damage theory based on sales, T. Ex. A-30, unsupported by any expert testimony. However, the Trial Court adopted defendant's damage theory then reduced damages by an additional thirty percent (30%) based on admitted speculation. The speculation being the amount that Petitioner damages should be reduced because of the effect of Petitioner going to work full-time in 1974. The

Court stated that *no direct evidence on this point was introduced at trial.* Amended Findings p. 39a.

In affirming the Trial Court's reduction based on admitted speculation, the Tenth Circuit in direct conflict with the above-mentioned cases, which hold that Plaintiff is entitled to his reasonable, proven damages and to the highest damage award that can be proved at trial. As the Second Circuit held in *Lowe's, supra;* when two equally supported theories of damages are introduced to the Court, the higher of the two must be used. In this case, two reasonable theories were introduced and the Court should have applied the higher theory introduced by Petitioners. However, the Court did not even accept the lower of the two reasonable theories, but rather adopted its own theory admittedly based on speculation.

The Court reasoned that because Olsen was working full-time during the base year, part of his profits should be used in determining damages and, accordingly, reduced the amount of profits in that year by thirty percent (30%). The Court admits that no direct evidence was introduced supporting its arbitrary reduction. Therefore, the allocation of profit in reducing damages could only be based on pure speculation.

The arbitrary reduction of damages without some proof determining the amount of the allocation is in direct conflict with this Court's holdings in *Bigelow, supra,* and *Eastman Kodak, supra.* These cases hold that the burden of uncertainty is on the wrongdoer. *See also* Von Kalinowski Antitrust Laws and Regulations, §115.02(2).

The Circuit Court's decision is also in conflict with *Zenith Radio Corp, supra.* In that case, this Court held

that defendant has the burden to prove other causes of the plaintiff's injuries once the injury has been proven. In effect, the Trial Court by the arbitrary reduction in damages places the burden on the Petitioners to clear up uncertainty and to prove no other causes of their injuries.

In addition, the Trial Court's reasoning overlooks the evidence that argues against the reduction of the damages. That evidence being that during the conspiracy, Guitars, Inc., had three people managing three stores on a part-time basis and they could not penetrate the market because of the boycott and refusal to deal to protect the price-fix. Even if some of the increase in profit after the end of the boycott could be attributable to the fact that Olsen was now working full-time, no reduction should have been made because the evidence clearly gives the inference that Olsen's failure to work full-time was due to the boycott. Therefore, the amount of profits that he lost because of his inability to penetrate the market and consequently being unable to work full-time and make a living, is simply a part of his damages. If there was any evidence on the issues of the amount of his profits, that could be attributed to his working full-time. That would be simply one element of his damages which he should be able to recover because of the conspiracy barring his efforts to penetrate the market.

In effect, the Court is stating that Olsen was in control of the conspiracy and could have ended it at any time by going to work full-time. Not only is the above thought ludicrous, it is contrary to the evidence. The demonstrable economic evidence shows that even if Olsen was working seven (7) days a week 365 days a year, he still could not have penetrated the market. See

Plaintiff's Exhibit 221 Appendix D, which shows that during the time the conspiracy was in effect no one could penetrate the CBS market in Utah.

The Trial Court also made an error by failing to award multiple damages where separate multiple injuries were proven. Plaintiff is entitled to recover damages for injuries sustained by way of the boycott, refusal to deal to protect the price-fix, and trade name infringement. Failure of the Trial Court to award damages for these multiple causes of injury is in conflict with *Albrecht v. Herald*, 452 F. 2d 124 (8th Cir. 1971). See also 16 ALR Fed. 14 and *Zenith*, *supra*, holding that the plaintiff is entitled to recover multiple damages for multiple injuries. Consequently the Court should grant a Writ of Certiorari in this case so they can review the decisions on damages and resolve the dispute.

POINT IV

THE LOWER COURTS ERRED IN DISMISSING THE SHERMAN ACT SECTION 2 CLAIMS.

Petitioners § 2 claims consist of conspiracy and attempt to monopolize. The lower courts dismissed the § 2 conspiracy to monopolize claims based on Petitioners failure to prove two of the four required elements of proof in § 2 conspiracy to monopolize cases. Those two elements are: 1) an appreciable amount of commerce; 2) specific intent.

With regard to the commerce issue, the lower courts findings are clearly erroneous under the test of Federal Rules of Civil Procedure 52(a) or they will stand as new precedent setting law as the single exception

case in the entire judicial system where the effect on commerce was satisfied for a § 1 violation of the Sherman Act, but not for a § 2 violation. See, Amended Findings at Conclusion of Law No. 4, where the commerce requirements are met for a § 1 violation. See, Tenth Circuit Opinion at p. 11a, where the commerce requirement is not met for § 2 claims. Also see, Kintner, "*Federal Antitrust Law,*" Vol. II, 1980 §14.4, n. 27. "Indeed there exists *no reported case in which the subject of a conspiracy to monopolize has been held to be too small to constitute, 'an appreciable part' of commerce.* See generally, 2 J. Von Kalinowski Antitrust Laws and Trade Regulations. § 9.01 [4], (1976). (Emphasis added.)

The lower court rulings in our case separated the proven § 1 conspiracy issues from the § 2 claims when they should have allowed the § 1 evidence to merge with the § 2 claims. United States Attorney General National Committee to Study the Antitrust Laws, (1955), p. 61 § c., citing *United States v. Swift*, 196 U.S. 375, (1905) for the basic statement of the rule, in part: "*When a conspiracy or combination is involved proof of this intent merges with proof of the conspiracy.*" (Emphasis added.)

Addressing the specific intent issue, this Circuit Court's opinion is in conflict with itself. This is evidenced where Petitioners meet the specific intent burden of proof under attempt to monopolize. Tenth Circuit Opinion at p. 9a. Then, inexplicably, Petitioners fail to meet the burden of specific intent in the *same conspiracy* under conspiracy to monopolize. See, Tenth Circuit Opinion at p. 12a.

The lower courts dismissed the § 2 attempt to monopolize claims based on Petitioners failure to prove

two of the four required elements of proof in attempt cases. Those elements are: 1) dangerous probability; and 2) relevant market.

Addressing the dangerous probability issue, the lower courts opinions are clearly erroneous because proof of dangerous probability merges with proof of the § 1 violation. *United States v. Swift, supra.* Specifically, the lower courts found a legal monopoly coexistent with an illegal conspiracy. Tenth Circuit Opinion at p. 11a. The lower courts also made conflicting findings. See, Amended Findings at p. 38a, where there was little competition for CBS instruments until 1974-75. Such a finding makes the CBS legal monopoly illegal. *Smith Klein Corp v. Eli Lilly & Co.*, 575 F. 2d 1056, (3rd Cir.) *cert. denied*, (1978), citing the narrow or intrabrand rule for monopoly. The lower courts in our case made no effort to explain the legal monopoly as it related to intrabrand competition, where little interbrand competition existed as to the complete line of CBS instruments.

Addressing the relevant market issue, relevant market is not required in per se cases; *United States v. Griffiths*, 334 U.S. 100, 92 L. Ed. 1243, (1948). Our case is a per se case. See, Tenth Circuit Opinion at p. 13a. Petitioners attempted to use a professional instrument market as separated from an amateur instrument market. That theory was rejected by the lower courts, thereby inferring that amateurs and professionals play the same instruments. Petitioners market theory was a classic viable theory. *Eastman Kodak v. Southern Photo Material Co.*, at 273 U.S. 376, 47 S. Ct. 404. Even so, the CBS market in Utah was totally exclusionary, eliminating *all competitors* to protect anticompetitive price-fixing. See, Trial Exhibit P-221 at-

tached in Appendix D. If the lower court opinions are allowed to stand in our case, this will be the first case on record to find a legal monopoly where competitors have been foreclosed from a substantial market to protect illegal price-fixing. See, *United States v. International Salt*, 332 U.S. 392, 68 S. Ct. 12 (1947), where such foreclosures are per se illegal.

There also exists in the judiciary, a significant controversy between the circuits as to what elements of proof are required in § 2 attempt and conspiracy cases. *Lessig v. Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964). Dangerous probability and relevant market were not required in *Lessig, supra*, to prove a violation. The Supreme Court has never directly confronted the *Lessig* case exception to guide the judiciary, leaving only dicta to assure uniformity in the judicial process. *Walker Process Equip., Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S. Ct. 347, (1965). Cited for that purpose in *Kintner, supra*, Vol. II § 13.

The lower courts holdings on the § 2 claims creates confusion in interpreting the antitrust laws. This is so because the lower courts held that Petitioner was actively and aggressively fighting the conspiracy to monopolize in his efforts travelling around the country to gather product wherever he could and thereby precluding monopoly. See, Tenth Circuit Opinion at p. 9a. "*The likelihood that monopolization would occur was very remote because Olsen showed himself to be a very aggressive competitor.*" The Circuit Opinion is saying that if one competitor is vigorously defending the right of free enterprise and competition in this country, then those attempting to monopolize will never be held liable for damages even though they may have driven all other competitors in the geographical market from the

trade. Since that is exactly what happened in our case, specifically as to the CBS line of goods for which there was little competition until 1974-75, that holding alone should spark this Court to grant a Writ of Certiorari to the Opinion of the Circuit Court to see that justice is done in the Court's capacity as supervisor of the antitrust laws.

CONCLUSION

For the foregoing reasons Petition's respectfully request this court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision of that Court.

JUN 1 5 1983

DATED this .... day of ...., 1983.

Respectfully submitted,

SUMMERHAYS, RUNYAN
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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1357 and 82-1400

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah Corporation,

Plaintiffs-Appellants,

vs.

PROGRESSIVE MUSIC SUPPLY, INC.; NORLIN MUSIC, INC., formerly CHICAGO MUSICAL INSTRUMENTS; and PEAVEY ELECTRONICS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Utah

(D.C. No. C-75-153)

EDWARD T. WELLS and W. ANDREW CLAWSON of Summerhays, Runyan and McClelland, Salt Lake City, Utah (LOWELL V. SUMMERHAYS, of Summerhays, Runyan and McClelland, Salt Lake City, Utah, on the brief), for Plaintiffs-Appellants.

STEPHEN G. CROCKETT, of Larsen, Kimball & Parr, Salt Lake City, Utah, for Defendant-Appellee Progressive Music Supply, Inc.

BRYCE E. ROE, of Roe and Fowler, Salt Lake City, Utah, for Defendant-Appellee Norlin Music, Inc., formerly Chicago Musical Instruments.

CURTIS L. FRISBIE, JR., of Gardere & Wynne, Dallas, Texas (Mark W. Bayer, of Gardere & Wynne, Dallas, Texas, with him on the brief), for Defendant-Appellee Peavey Electronics, Inc.

Before MCWILLIAMS, DOYLE and SEYMOUR, Circuit Judges

DOYLE, Circuit Judge

The plaintiff Olsen does business as Guitar City Studios, Inc., and he brings this action pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 2(e) of the Clayton Act, 15 U.S.C. 13(e).

Named as defendants in Olsen's complaint and amended complaint are Progressive Music Supply, Inc.; Acoustic Control Corporation; Ovation Instruments, Inc. (a/k/a Kaman Corporation); Norlin Music, Inc. (formerly Chicago Musical Instrument Company); CBS Musical Instruments (a division of CBS, Inc.); ARP Instruments, Inc.; and Peavey Electronics Corporation.

The claims against ARP and CBS have been dismissed. Also, Judge Anderson, the trial judge, granted several of the defendants' motions to dismiss on behalf of claims against Norlin, Ovation, Acoustic and Peavey. Olson's Section 2 Sherman Act claims against Progressive involving an attempt to monopolize and conspiracy to monopolize were also dismissed.

Finally, the court found that there were only two counts on behalf of the appellants which had merit. First, the court determined that Progressive had conspired to restrain trade in violation of Section 1 of the Sherman Act. The court, however, found that Olsen had suffered no injury as a result of this conspiracy, and so the court concluded that Olsen was not entitled to damages based on this conduct. Second, the court held that Progressive had violated Section 1 of the Sherman Act by conspiring to boycott Olsen from receiving CBS products. Damages were found to total \$4,303, which, after trebling, amounted to \$12,909.

I.

FACTUAL BACKGROUND

Olsen was and is engaged in the retail sale of musical instruments in the Salt Lake City, Utah area. During the period commencing in 1964 and continuing to 1975, Olsen's business was conducted under the name of "Guitars, Inc.," a Utah corporation. One of the several people associated with Olsen in this venture was George Best. Until 1970, Olsen operated an outlet at Kaysville, Utah, and Best operated an outlet at Bountiful, Utah. Guitars, Inc. ordered instruments for both stores, paid half of the telephone bills of each store, and held the franchises in its name. The proceeds from sales by the stores were forwarded to Guitars, Inc. After the bills were paid, those proceeds were divided among Olsen, Best and an associate named Steven Hight.

During the year 1970 there was a disagreement between Olsen and Best, and they executed a separation agreement which essentially terminated all business relations between them, and then each began conduct-

ing his own business operation, essentially as sole proprietors of each store. Guitars, Inc. still served as a purchasing entity. Following this division, Best entered into a brokerage agreement with the defendant Progressive Music Supply, Inc., which is said to be one of the largest retail music instrument dealers in Utah.

In February of 1975, Olsen formed a new corporation, Guitar City Studios, Inc., and during the time leading up to that several changes were made in Olsen's business. Prior to 1974, Olsen had operated his Kaysville store on a part-time basis. In 1974 he moved his location and commenced business full-time. Olsen had also added a repair service to his business.

Following the changes made in his business operations, Olsen's sales increased dramatically. Prior to 1974 he sold about 7% of the volume that was sold by Progressive, the market leader in Utah. After changing his business to a full-time operation, Olsen's sales rose, until in 1977, they were approximately 70% of Progressive's sales.

After Best entered into the brokerage agreement with Progressive in 1971, Olsen maintained that he had difficulties in obtaining musical instruments from various manufacturers. The defendant manufacturers involved in the present litigation were willing to make Olsen a dealer, but later refused to sell to Olsen, due to commitments to Progressive. This is according to Olsen's allegations. Olsen maintains that he was thus forced to obtain or bootleg instruments through other dealers at higher costs, and that this caused actual financial loss. As a result, in April of 1975, Olsen and Guitar City Studies, Inc., brought suit against Progressive and six manufacturers.

The case based upon Section 1 of the Sherman Act alleges that Progressive conspired separately and jointly with each manufacturer to fix prices, establish Progressive as each manufacturer's exclusive dealer in the state of Utah, terminate Olsen's dealing in each manufacturer's products (except as against Peavey), and boycott Olsen's business. A further complaint on behalf of Olsen was that Progressive conspired with certain unnamed co-conspirators, for example, George Best, CBS Musical Instruments (CBS) and Bobbie Herger (owner and operator of Herger's Music Store in Provo, Utah), in violation of Section 1 of the Act. Olsen asserts that Progressive conspired with Best to cause Olsen to lose franchises, to destroy his credit and business reputation, to take over his business location and terminate his corporate charter, to fix prices, and to cause manufacturers to boycott his business. Further allegations by Olsen as against Progressive and CBS were that, with the help of Herger, they conspired to establish Progressive as CBS's exclusive dealer for the state of Utah, to fix prices, to terminate Olsen as a CBS dealer, to boycott Olsen's business and to cause CBS to require other dealers not to sell CBS products to Olsen. Olsen's final allegation is that the defendants conspired together to boycott Olsen and to attempt to monopolize the Utah market in certain musical instruments.

II.

THE CLAIMS AGAINST NORLIN, OVATION AND PEAVEY

These named defendants are shown to be manufacturers of musical instruments. As to Norlin, there were a total of sixteen charges of unfair practices and

competition. As to Ovation, there were four such charges, and as to Peavey, there were three such charges. There was also a general allegation against Norlin, Ovation, Peavey and others that they had conspired together to boycott Olsen and had conspired to create a monopoly on behalf of Progressive. Following the presentation of the evidence, the defendants moved for dismissal based upon insufficiency of the evidence. The court said that Norlin had refused to deal with Olsen only as a business convenience, and not for any anti-competitive purpose. Also the trial court determined that Norlin had not committed the anti-competitive acts alleged by Olsen, and that Norlin treated Olsen and Progressive similarly.

As to Ovation, the court, upon weighing the evidence, concluded that Ovation had not violated any of the sections of the Sherman Act.

Finally, with respect to Peavey, the trial court weighed the evidence and the inferences to be drawn therefrom and reached the conclusion that Peavey had not conspired with any other defendant contrary to Section 1 of the Sherman Act. And, according to the court, Peavey had not conspired to fix prices or to create a monopoly on behalf of Progressive.

We conclude that the trial court was correct in making these rulings.

III.

DISMISSAL OF OLSEN'S CLAIMS AGAINST NORLIN, OVATION AND PEAVEY.

In reviewing the propriety of the rulings, we are governed by the clearly erroneous test. Fed. R. Civ. P.

41(b), 52(a). *See* Blankenship v. Herzfeld, 661 F. 2d 840, 845 (10th Cir. 1981); *and see* Woods v. North American Rockwell Corp., 480 F. 2d 644, 645-46 (10th Cir. 1973).

It is Olsen's position that when a 41(b) motion is imposed in an anti-trust case, the evidence must be viewed in a light most favorable to the plaintiff. In light, however, of *Blankenship,* which also involved such a motion in a private anti-trust case, it would appear that Olsen's view is unfounded. *See also* Rutledge v. Electric Hose & Rubber Co., 511 F. 2d 668, 676 (9th Cir. 1975), which said: "[t]he fact finding process under a Rule 41(b) motion calls for an adjudication upon the merits of the plaintiff's claims and may involve a weighing of the evidence as it stands at the close of the plaintiff's case."

The district court drew permissible inferences based upon the record evidence. Moreover, as this court held in Rasmussen Drilling v. Kerr-McGee Nuclear Corp., 571 F. 2d 1144, 1148 (10th Cir.), *cert. denied,* 439 U.S. 862 (1978), "[a] choice between two permissible views is not 'clearly erroneous.' "

IV.

DID THE TRIAL COURT ERR IN DISMISSING OLSEN'S SECTION 2 SHERMAN ACT ATTEMPTED MONOPOLIZATION CLAIM AGAINST PROGRESSIVE?

Olsen argues that Progressive attempted to monopolize the Utah retail market in quality synthesizers, quality amplifers and quality electronic and acoustic

guitars. "Quality" was defined as guitars and amplifiers retailing for over $300 and synthesizers retailing for over $700.

To support a claim based on an attempt to monopolize plaintiffs are required to establish several items. First, they must demonstrate a dangerous probability of success. Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); Swift & Co. v. United States, 196 U.S. 375, 396 (1905). Second, plaintiffs must prove acts in furtherance of the attempt, although thes acts need not be successful. Lorain, *supra*, at 153. Third, plaintiffs must demonstrate specific intent to monopolize. Times Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953); E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F. 2d 296, 306 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). Fourth, a relevant market, within which the attempted monopolization occurred, must be established.[1]

The district court dismissed Olsen's attempted monopolization claim because of its failure to establish

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[1]Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975); Bonne Bell, *supra*, at 305; George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 508 F.2d 547, 550 (1st Cir. 1974), *cert denied*, 421 U.S. 1004 (1975); Acme Precision Prods., Inc. v. American Alloys Corp., 484 F.2d 1237, 1240 (8th Cir. 1973); Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279, 1284 (7th Cir. 1969), *cert denied*, 397 U.S. 912 1970); United States v. Chas. Pfizer & Co., 245 F. Supp. 737, 739 (E.D.N.Y. 1965); Becker v. Safelite Corp., 244 F. Supp. 625, 637 (D. Kan. 1965). *But see*, Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) ("the relevant market is 'not in issue' in an attempt or conspiracy to monopolize case").

two of the aforementioned requisites, to-wit, dangerous probability of success and relevant market.

With regard to dangerous probability of success the district court said:

> [P]laintiff's own expert, Mr. Scott Lloyd, testified that the information submitted in this case did not show Progressive's percentage share of the market. Without this, the court is unable to make any finding as to the dangerous probability that Progressive could monopolize the market.

A review of the record reveals that there was no such dangerous probability of monopolization by Progressive. In fact, Progressive's efforts to control market share by causing manufacturers not to ship products to Olsen were consistently thwarted by Olsen's ready resort to an alternative source of supply: other dealers. The likelihood that monopolization would occur was very remote because Olsen showed himself to be a very aggressive competitors.

With regard to Olsen's failure to establish a relevant market, the district court stated that Olsen had failed to prove a relevant product market "composed of a unique set of products, distinguishable from products selling for less money. In short, the plaintiffs failed to show that the products included in the market definition were not 'resonably interchangeable' and competitive with less expensive products." (Quoting United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956). Due to the fact that a "sufficiently discreet and separable product market" had not been defined, the trial court concluded that it could not "gauge the defendants' potential for inflicting economic harm."

Even if Olsen had adequately delineated a relevant product market, he nevertheless failed to prove that Progressive had a controlling position in that market. Indeed, the absence of proof of market share was emphasized throughout the record.

Olsen contends, however, that evidence of market share was introduced, namely, Utah sales of CBS Fender and Rhodes products. This contention is misleading. It was introduced not to demonstrate market share, but rather to show that Progressive was "cherry-picking," that is, picking a manufacturer's type "A" product without having to pick and promote his full line. Moreover, the exhibit offered by Olsen as proof of market share concerns but a subset of the relevant product market in issue. The relevant product market was all quality guitars, amplifiers, and synthesizers. The CBS sales study offered by Olsen encompasses, of necessity, only CBS products. Therefore, it cannot serve as evidence of market share. To be sure, the study could, after a few calculations, yield evidence of total market share if CBS's own share of the Utah market had been established, which it was not. Olsen's expert witness responded "No" to the following questions: "Can you give me an approximation that CBS had 30 percent of the market, 10 percent of the market in 1974 or 70 percent? Can you tell me that far?"

In light of the foregoing, we conclude that the trial court's findings were not clearly erroneous. Accordingly, the dismissal of Olsen's attempt to monopolize claim should be affirmed.

V.

DID THE TRIAL COURT ERR IN DISMISSING OLSEN'S SECTION 2 SHERMAN ACT CONSPIRACY TO MONOPOLIZE CLAIM AGAINST PROGRESSIVE?

The elements needed to establish conspiracy to monopolize are as follows:

First, the existence of a combination or conspiracy to monopolize. *American Tobacco, supra,* at 788.

Second, overt acts done in furtherance of the combination or conspiracy. Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n. of South Carolina, 436 F. Supp. 418, 425 (D.S.C. 1976), *aff'd,* 569 F. 2d 821 (4th Cir. 1978).

Third, an effect upon an appreciable amount of interstate commerce. United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947); *Times-Picayune, supra,* at 611.

Fourth, a specific intent to monopolize. *American Tobacco, supra,* at 809.

A relevant market need not be established. Salco Corp. v. General Motors Corp., 517 F. 2d 567, 576 (10th Cir. 1975) ("specific intent to monopolize is the heart of a conspiracy charge, and a plaintiff is not required to prove what is the 'relevant market' ").

The district court based its dismissal of Olsen's conspiracy to monopolize claim on two factors. First, Olsen did not establish that the conspiracy of Progressive involved an appreciable part of interstate commerce. The only part of commerce which could conceivably be affected by such activity is the CBS Fender line. Progressive already had a monopoly on that line under an arrangement which the court had previously found was not *per se* illegal under Section 1.

The trial court also dismissed Olsen's conspiracy claim on the basis that Progressive did not harbor a specific intent to obtain a complete monopoly in all lines of musical instruments. The court observed that the evidence indicated only that "Progressive held exclusive franchises on certain product lines and may have prevented others from obtaining business on those lines."

We conclude the trial court's findings were not clearly erroneous. The dismissal by the trial court of the conspiracy to monopolize claim is affirmed.

VI.

DISCUSSION OF OLSEN'S BOYCOTT THEORY.

The trial court found that Progressive had conspired with CBS and Bobbie Herger to boycott Olsen, whereby he would not be able to obtain CBS products. This boycott was an element of the price fixing conspiracy also alleged engaged in by Progressive and Herger. The trial court said, "it was necessary to boycott Olsen in order that high prices set by Progressive and Herger could be maintained and not be undercut by Olsen."

The argument of Progressive on cross-appeal is that the trial court improperly treated the group boycott involved herein as a *per se* violation of the anti-trust laws. United States v. Realty Multi-List, Inc., 629 F. 2d 1351, 1367 (5th Cir. 1980). Progressive contends that a group boycott is not deemed a *per se* violation if it is "at least potentially reasonably ancillary to joint, efficiency-creating economic activities. (Quoting Realty *Multi-List*, *supra*).

In this case there is evidence that there was a boycott which was "clearly exclusionary or coercive in nature." Gould v. Control Laser Corp., 462 F. Supp. 685, 691 (M.D. Fla. 1978), *aff'd*, 650 F 2d 617 (1981). Thus, the case differs from those in which "courts have circumvented the rigidity of the *per se* rule by reasoning that the need for its application 'depends not upon a finding that * * * [a restraint] constitutes a boycott' but upon an analysis of its purpose and competitive impact.' " Note, The Facial Unreasonableness Theory: Filling the Void Between Per Se and Rule of Reason, 55 St. John's L. Rev. 729, 750 n. 155 (1981) (quoting *Gould, supra*, at 691). Pro-competitive impacts or motives within the trial court's findings are difficult to see. For instance, Herger boycotted Olsen because "she had an independent prejudice against giving competitive dealers large discounts." In addition, Progressive harbored a "predatory intent toward competing dealers."

From the findings it would appear that the boycott engaged in by Progressive was *per se* violative of the anti-trust laws. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (*per se* violation of Sherman Act exists when department store conspires with appliance manufacturers and distributors to prevent sales to small retail appliance stores).

Based upon the proposition that Progressive had violated Section 1 of the Sherman Act by conspiring to boycott Olsen from receiving CBS products, the trial court assessed damages at $4,303 before trebling. In calculating these damages, 1975 was used as a base year but by that time the boycott had been terminated, thus giving Olsen free access to CBS products. The damage study employed by the court then projected

backwards from 1975 to estimate the amount of damages that the boycott had caused. More specifically, the study reduced Olsen's total retail CBS sales for 1975 (stipulated to be $27,000) to a wholesale price figure, compared this figure with equivalent figures for CBS dealers in the state to determine Olsen's share of the CBS market in Utah for 1975, and then calculated the amounts Olsen would have earned if he had enjoyed the same market share in previous years. The projections of market share were reduced by 30%, however, to account for changes in Olsen's business operations, between 1971-1974 and 1975. The preceding damage analysis as worked out by the court is appended to this opinion.

The court determined that Olsen had suffered net lost profits of $4,303 from the years 1971 to 1974. Pursuant to 15 U.S.C. § 15, this figure was trebled to $12,909.

The calculations were derived, with one significant exception, from a damage study introduced into evidence by Olsen. The exception was that, unlike the damage study, the court did not assume that Olsen's increase in market share in 1975 (the base year) was due solely to the termination of the boycott. The court noted that in 1975, "Olsen was operating in a substantially different mode than during most of the damage period." Olsen had converted from a part-time to a full-time business and had, by moving to a larger store, doubled his floor space. Accordingly, the court diminished the 1975 sales base by 30% to reflect the role of the extra hours and space.

On appeal, Olsen argues that the damages awarded were too low, while Progressive asserts that the evidence does not sustain any award for damages. Olsen's

first contention is that the 30% reduction is improper. Olsen argues that he would have moved and switched to full-time operations well before 1975 if the boycott had not been in effect. For that he maintains that it was wrong for the trial court to reduce damages in an arbitrary manner on account of Olsen's very failure to move.

The trial court considered as "too speculative" Olsen's contention that he would have altered his business operations but for the boycott. The court is referring to Olsen's contention that he would have altered his business operations but for the boycott. It is true that a plaintiff in an anti-trust case should "not be held to a rigid standard of proof regarding the amount of damages, since in such cses economic harm is frequently intangible and difficult to quantify." King & King Enterprises v. Champlin Petroleum Corp., 657 F. 2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-65 (1931). On the other hand, "damages may not be merely speculative." *King & King, supra.*

Evidence in the record provided a reasonable basis for the court's determination. That is that Olsen's failure to alter his business operations in 1971-1974 was not due to his inability to obtain musical instruments. Olsen testified that, except for several delays which could well have been caused by order backlogs, he was able to obtain instruments from other dealers, if not from the manufacturers themselves. Also, Olsen was employed during that period by the Federal government. As this employment provided the bulk of Olsen's income, it is reasonable to conclude that the fear of losing a secure source of income, as opposed to an in-

ability to obtain musical instruments, prevented Olsen from taking up his music store business on a full-time basis.

Olsen also contends that the trial court was incorrect in applying a 30% reduction formula. According to Olsen, the reduction should have been applied only to estimated 1971-1974 sales, not to actual sales.

However, Olsen's math is wrong. The 30% reduction considers the fact of reduced floor space and selling time in the years 1971-1974 (as opposed to the base year of 1975). Floor space and selling time is essential to sales of actual and hypothetical musical instruments. Space and time devoted to hypothetical sales cannot be devoted to actual sales. Accordingly, the 30% reduction in both actual and estimated sales does not seem unreasonable in order to deal with Olsen's change in business operations between 1971-74 and 1975.

Progressive argues on cross-appeal that the evidence cannot sustain an award of damages to Olsen of any amount. The trial court, however, gave careful scrutiny to the entire picture and had no trouble finding that Olsen had sustained his burden of proof as to injuries suffered. The court said that "[i]nferences can be drawn that the boycott conspiracy foreclosed at least two avenues of supply, Herger and Browne [owner and operator of California Musical Instruments], from which injury occurred." The trial court also concluded that Progressive had not established that other sources of supply fully compensated for the foreclosure of Herger and Browne.

In view of these findings, this court should uphold the award of damages. *See King & King, supra,* at

1158 ("once there is found to be sufficient factual evidence of damages, the plaintiffs are not obligated to establish the quantum of damages 'with mathematical precision.' ") (Quoting Cackling Acres, Inc. v. Olson Farms, Inc., 541 F. 2d 242, 246 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977). *See also* Trabert & Hoeffer, Inc. v. Piaget Watch Corp., 633 F. 2d 477, 484 (7th Cir. 1980); Woods Exploration & Producing Co. v. Aluminum Co. of America, 509 F. 2d 784, 792-93 (5th Cir.), *cert. denied,* 423 U.S. 83 (1975); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 346 F. 2d 661, 666 (6th Cir.), *cert. denied,* 382 U.S. 904 (1965).

VII.

DID THE TRIAL COURT ERR IN DENYING OLSEN'S PRICE FIXING CLAIM?

The trial court found that Progressive and Herger had agreed to divide territories and to fix high retail prices on CBS products in violation of Section 1 of the Sherman Act. The trial court, however, refused to award damages on this conduct, based upon its conclusion that the conspiracy had not damaged Olsen. The court observed that "[l]ogically, the higher the prices set by Herger and Progressive, the easier it was for Olsen to compete in the Utah retail market for CBS products."

High fixed prices might facilitate the entrance of new competitors into a relevant product market, or may help the competitive position of sellers not participating in the price fixing conspiracy. Nevertheless, it is clear that such beneficial features cannot render a price fixing conspiracy immune from anti-trust attack.

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980). Indeed, price fixing agreements are *per se* violative of Section 1 of the Sherman Act. *Catalano, supra*, at 648; United States v. Container Corp. of America, 393 U.S. 333, 337 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n. 59 (1940); *King & King, supra*, 1151.

However, the violation should not give rise to "double liability trebled." City and County of Denver v. American Oil Co., 53 F.R.D. 620, 631 (D. Colo. 1971). Olsen's price fixing damage theory would do just that. Olsen's damage calculations are as follows:

Progressive's CBS market 1971-1974 from the business records of CBS and Progressive	$297,709	1
Guitar City 70% of Progressive's CBS market, but for the conspiracy	208,396	2
Wholesale of Guitar City CBS market at benchmark, 50% of list cost	104,198	3
Guitar City retail sales CBS 70% market, at their normal discount, or 85% of list	177,137	4
Guitar City gross profit CBS 70% market, line 4 minus line 3	72,939	5
Minus 10.65% variable overhead expenses, of line 2	22,194	6
Minus awarded boycott damages	4,303	7
Net economic loss	46,442	8
Trebled damages	139,326	9

The weakness of this formula is that it compensates for the same transactions that have already been addressed by the trial court's award of boycott damages.

Line 2 of the derivation assumes that Olsen would have had 70% of Progressive's CBS market but for the conspiracy. An identical assumption, although phrased in terms of Olsen's potential share of the entire Utah CBS musical instrument market (as opposed to his share of Progressive's market) was made with respect to Olsen's boycott damages (see line 4 of trial court's boycott damage formula). So, therefore, the same injury is being counted up twice. Accordingly, the trial court properly declined to award both boycott and price fixing damages where they stemmed from the same transactions.

VIII.

WHAT ABOUT THE CONTENTION THAT SOME OF THE MORE SIGNIFICANT TRIAL TRANSCRIPTS WERE MISSING?

Olsen asserts on appeal that trial transcripts which were favorable to his position were not before the trial court during the decision making process. Thus, according to Olsen, the court failed to make certain findings, made erroneous findings, failed to understand Olsen's economic theories, failed to award price fixing damages, failed to award reasonably proved boycott damages, and failed to draw inferences in favor of Olsen.

Almost every page of the neglected transcripts contains testimony which the trial court was privy to during each and every day of the trial below. This element, plus the fact that the court had available to it the bulk of the trial transcripts, all of the pleadings and all of the trial exhibits, certainly gave the court the basis for reaching an accurate conclusion. A care-

ful review of the neglected transcripts does not reveal reversible error by the trial court. *See* United States v. Lee, 622 F. 2d 787, 791 (5th Cir. 1980), *cert. denied,* 451 U. S. 913 (1981) (although the district court failed to review the entire record, it had "adequately informed itself of the record * * * to make the determination required"); Simpson Bros. v. District of Columbia, 179 F. 2d 430, 436 (D.C. Cir. 1949), *cert. denied,* 338 U.S. 911 (1950) (although the district court had not read all the pleadings in the case, "the record * * * and the opinion of the district court show that by the end of the hearing on the motions for summary judgment the court was acquainted with the issues in the case and that the conclusion reached by the court was — in view of all the pleadings, deposition, affidavits and authorities — correct.").

Olsen maintains on appeal that certain evidence was improperly excluded from the record. Progressive claims that other testimony was improperly received into evidence. The trial court's rulings on these matters did not prejudicially affect the outcome of the litigation. See Union Carbide and Carbon Corp. v. Nisley, 300 F. 2d 561, 586 (10th Cir. 1961), appeal dismissed, 371 U.S. 801 (1962); Fed. R. Civ. P. 61.

In light of what appears above, it is the conclusion of this court that the judgment of the trial court should be and it is hereby affirmed.

APPENDIX B

[¶ 64,928] Clair Olsen and Guitar City Studios, Inc. v. Progressive Music Supply, Inc., Acoustic Control Corp., Ovation Instruments, Inc., Norlin Music, Inc., formerly Chicago Musical Instruments,[1] Columbia Broadcasting Systems, Inc., and Peavey Electronics Corp.

U. S. District Court, District of Utah, Central Division. No. C 75-153. Filed June 26, 1981.

Sherman Act

Price Fixing—Division of Territories—Agreements Between Competitors—Retail v. Wholesale Price Fixing—Damages. — An agreement between two competing authorized musical instrument dealers to fix retail prices and divide territories constituted a *per se* violation of Sec. 1 of the Sherman Act. However, a competing unauthorized dealer showed no evidence of a conspiracy to fix wholesale prices or to set a discount that the unauthorized dealer should have been given. In light of its other sources of supply that could be used to purchase instruments at a discounted price, the unauthorized dealer was not damaged by the price fixing agreement. See ¶ 3050.66, 4630.72.

Refusal to Deal—Denial of Dealership—Business Reasons—Musical Instruments. — A musical instrument distributor's denial of a dealership to a retailer

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[1]The original version incorrectly indicated Chicago Musical Instruments as a division of Columbia Broadcasting System, Inc. The Words "a division of" have been omitted in the amended version.

was premised on the distributor's independent business reasons and was not the result of a conspiracy between the distributor and an existing dealer. The retailer did not have any repair facilities, which the distributor strongly favored, no evidence was shown that the dealer knew of a proposed dealer agreement with the retailer, and the retailer began operating on a full-time basis very late in the relevant time period. See ¶ 2420.

Boycotts — Forcing or Inducing Adherence — Enforcement of Restrictive Dealer Contracts — Complaint by Dealers — Price Fixing. — Creation of credit problems for dealers, temporary supply cutoffs, and tracking of instrument serials numbers to enforce a musical instrument distributor's policy disfavoring transshipment of its products to unauthorized dealers, as a result of an agreement with a complaining authorized dealer, evidenced a conspiracy to boycott an unauthorized dealer. A price fixing agreement between the complaining dealer and a competitor also established the boycott, because, as a further step of the agreement, it was necessary to boycott the unauthorized dealer so that the high prices set by the competing dealers could not be undersold. The second dealer was in a different market area from the unauthorized dealer and might have been amenable to dealing with the unauthorized dealer, but it had previously had its instrument supply temporarily terminated for noncompliance with the price fixing agreement. Statements by the distributor and the complaining dealer establishing predatory intent were also shown by the unauthorized dealer. See ¶ 2460, 2480.

Private Suits — Damages — Market Share in Base Year — Market Forces — Change in Operations — Musical Instrument Industry. — Damages to an unauthorized musical instrument dealer, as a result of a con-

spiracy between two competing dealers and their distributor were based upon the unauthorized dealer's market share of the distributor's products in the relevant market in 1975, when it had free access to the products. That share was related back over the damage period. Uncertainty arising from direct evidence of the extent that the conspiracy prevented the unauthorized dealer from buying all the products it otherwise would have was a burden the conspirators had to clarify or bear. Fluctuations in demand for the instruments, the distributor's difficulty in keeping up with demand, emergence of competing brands, and market productivity in general were factors considered in determining the amount of damages. The facts that the unauthorized dealer switched from part-time to full-time selling and moved to a new, larger store during the relevant period also affected the award. See ¶ 9302.

For plaintiffs: Lyle J. Barnes, Kaysville, Utah, Lowell V. Summerhays, Salt Lake City, Utah. For defendants: Stephen G. Crockett, Salt Lake City, Utah, Richard W. Giauque, of Giauque & Williams, Salt Lake City, Utah, Robert A. Mackey, Los Angeles, Cal., E. Scott Savage, Salt Lake City, Utah, Bryce E. Roe, Salt Lake City, Utah.

Amended*

Findings of Fact and Conclusions of Law

ANDERSON, D. J.: After four years of discovery and motions and a non-jury trial of twenty-seven days that spanned one and one-half years, this case is now ready

*On April 13, 1981, the court held a hearing at which defendant Progressive orally moved to amend the court's Findings of Fact and Conclusions of Law, which were entered herein on April 3, 1981. The basis of the motion was that

for final decision. During the pendency of this action all of the defendants have been dismissed from the case, either by stipulation or by order of the court, with the exception of defendant Progressive Music Supply, Inc. (Progressive). On November 3, 1975, the parties stipulated to, and the court ordered, the dismissal of defendant ARP Instruments, Inc. On December 11, 1975, the court ordered that defendant CBS Musical Instruments be dismissed without prejudice. At the close of plaintiffs' case on June 12, 1979, the court dismissed Ovation Instruments, Inc., and Norlin Music, Inc. And in the court's order dated May 22, 1980, [Order Granting in Part Defendants' Motion to Dismiss Under Rule 41(b)], defendants Peavey Electronics Corp. and Acoustic Control Corp. were dismissed.

The May 22, 1980, order also narrowed the issues that remained for the presentation of defendant Progressive's case. It dismissed all of plaintiffs' Sherman Act § 2 claims and dismissed plaintiffs' § 1 claim, except as against Progressive to the extent it involved CBS Musical Instruments and Bobbie Herger. There-

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certain factual errors appeared in the original version. The court invited counsel to submit the motion in writing with supporting and opposing memoranda relating to the impact, if any, the corrections would have on the Conclusions of Law and Judgment. Olsen filed a motion on April 24, 1981, entitled, "Motion to Amend and for Additional Findings of Fact and Conclusions of Law and for Entry of New Judgment Pursuant to Rules 52 and 59, Federal Rules of Civil Procedure." Memoranda on the motions have now been filed with the court. Corrections have been incorporated into the amended version, and are indicated by footnote, together with any effect the correction has on the court's decision. Additional findings and conclusions have also been made as indicated.

fore, the basic issue remaining to be resolved was whether Progressive was liable to plaintiffs for illegally conspiring to restrain trade or commerce in violation of Section 1 of the Sherman Act and, if so, the extent of the damages suffered by plaintiffs.

On November 12, 1980, the trial of these final matters began with the further presentation of plaintiffs' evidence regarding damages. Progressive then presented its case, concluding on November 18, 1980, on which date final arguments of counsel were heard. Plaintiffs were represented by Lowell V. Summerhays, and Progressive was represented by Stephen G. Crockett. The court granted counsel leave to file final briefs, and the same having been received, the matter is finally submitted.

Briefly summarzied, the parties' claims are as follows: Plaintiffs claim that Progressive conspired with CBS Musical Instruments and/or Bobbie Herger and others to establish Progressive as the exclusive dealer for CBS products in Utah, to fix prices, to terminate plaintiffs as a CBS dealer, and to boycott plaintiffs from receiving CBS products. Plantiffs further claim that they were damaged in their business and property primarily through the loss of sales they should have had but for the conspiracy. Progressive denies any violation of Section 1 of the Sherman Act, either by price fixing or boycott, and denies that plaintiffs have been damaged as a result of any conduct by Progressive. Progressive also disagrees with plaintiffs' method of formulating damages.

Pursuant to rule 52(a) of the Federal Rules of Civil Procedure, the court enters the following Findings of Fact and Conclusions of Law, reflecting the court's

determination that plaintiffs have established by a preponderance of the evidence that Progressive conspired illegally to restrain trade or commerce in violation of Section 1 of the Sherman Act.[2]

Findings of Fact

1. At all times relevant herein, plaintiff Clair Olsen has been engaged in the retail sale of musical instruments, amplifiers, public address systems, and accessories in Kaysville, Utah until early 1975, when he moved his place of business to a larger store in Kaysville. (Transcript, Vo. VIII, p. 1893-96). Prior to April 2, 1974, Olsen operated his business on a part-time basis. (Transcript, Vol. VIII, p. 1890). After he went full-time and after he moved to the larger store, the business's sales volume increased substantially.[3] Olsen engaged in business as a sole proprietor to February 24, 1975, when he caused the organization and incorporation of plaintiff Guitar City Studios, Inc. Since that time, he has been carrying on the same business as principal officer and sole shareholder of Guitar City. They interests of Olsen and Guitar City in this litigation are joint (and hereinafter plaintiffs will be collectively referred to as "Olsen").

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[2] The original version found no conspiracy to boycott. On further reflection, the court has determined that the evidence shows a conspiracy between Progressive, CBS, and Herger to boycott Olsen from receiving CBS products from Progressive, Herger, and Browne.

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[3] The first two sentences of this paragraph in the original version erroneously stated that Olsen moved his business to the Centerville store in May of 1974, and that he began operating his business on a full-time basis in February of 1975.

2. Defendant Progressive Music Supply, Inc. ("Progressive") is a Utah corporation engaged in the retail sale of musical instruments, amplifiers, public address systems, accessories, and related items. It has retail stores in Ogden, Provo, and Salt Lake City, Utah. Don Penman is the primary owner and operator of Progressive.

3. CBS Musical Instruments ("CBS") is an operating subdivision of Columbia Broadcasting Systems. CBS manufactures and distributes musical instruments that are sold throughout the United States including the State of Utah. At all times relevant herein, Robert P. Bull was a vice president for CBS; Margaret Current was secretary to Robert Bull from approximately 1974 to 1975, and later worked for Doug Browne.

4. Mrs. Bobbie Herger ("Herger") is the owner and operator of Herger's Music Store in Provo, Utah.

5. Doug Browne, at times relevant herein, owned and operated California Musical Instruments.

6. The businesses of CBS, Olsen, Progressive, Herger, and Browne involved interstate commerce.

7. The Complaint in this action was filed on April 18, 1975.

[*Price Fixing*]

8. Commencing sometime in 1967, Penman and Herger agreed to fix retail prices on CBS products at prices higher than on the CBS price list. The agreement included a division of territories. The agreement continued until February of 1973. (Transcript, Vol. I,

pp. 178-83; 189-92). Mrs. Herger testified that in late 1972 she contacted CBS about her price-fixing arrangement, and that she was told she could sell the products at whatever price she desired. She testified that she waited until February because CBS wanted to get in touch with Penman and "work it out" with him. (*Id.* pp. 190-91). This leads to the inference that CBS wanted to obtain Porgressive's approval before allowing Herger to break the price-fixing agreement. The evidence shows that in the late 1960's "pressure was brought to bear" by CBS representative Bud Driver to enforce compliance with the price-fixing arrangement. (*Id.* pp. 169-71).[4] In February of 1973, she then lowered her prices, in some instances below the CBS list price. She was not contacted thereafter by Penman regarding prices. (Transcript, Vol. I, p. 192).

9. There is no believable evidence that Herger and Penman ever discussed fixing wholesale prices, or more specifically, whether Olsen should be given a discount at any particular rate. Nor was there any evidence of an agreement to that effect. Mrs. Herger testified that she had a unilateral and independent prejudice against giving competitive dealers large discounts. (Transcript, Vol. I, pp. 207; 223-26). On May 4, 1972, Olsen purchased one Fender guitar from Herger for resale to a customer of his. (Ex. A-4). The guitar was sold at the Progressive retail list price and a 20% "commission" was paid to Olsen indirectly. (Transcript, Vol I, pp. 207-209, 215). Mrs. Herger testified that the transaction was handled in this way because CBS frowned on transshipping, and because of the pricing

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[4] The preceding three sntences have been addd to demonstrate CBS's protectionistic role with Progressive.

and territorial agreement with Progressive. (*Id.* at 215; 220-21).[5] Olsen never tried to purchase CBS instruments from Progressive. He testified, however, that Progressive always sold Olsen CBS parts when he needed them. (Olsen Deposition, Vol. III, p. 84).

10. Olsen had various sources of supply available to him through which he could purchase CBS instruments at wholesale at 60% of the retail list price during most of the relevant statutory period of April 18, 1971, to April 18, 1975.[6] (Transcript, Nov. 13, 1980, p. 206). It is unclear from any direct evidence the extent to which CBS products were unavailable to Olsen as a result of a boycott conspiracy in light of availability through other dealers.

11. Olsen was not damaged by the Herger-Progressive conspiracy to divide territories and to fix high prices. Logically, the higher the prices set by Herger and Progressive, the easier it was for Olsen to compete in the Utah retail market for CBS products.

[*Dealership Agreement*]

12. Progressive did not conspire with others to prevent Olsen from becoming a CBS dealer. There was evidence produced at trial that CBS had a file on Olsen. (Current Deposition, Vol. I, pp. 10-15). It was the practice of CBS to set up a file on any person where there were three or more pieces of correspondence re-

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[5] The preceding three sentences were added to this amended version.

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[6] The finding originally stated that the wholesale purchases could be made at a 60% discount; however, the court had in mind and intended to state that the wholesale purchase price was 60% of the retail list price or, in other words, a 40% discount.

lating to that person to justify a file. (*Id.* pp. 9-10). There is confusion in the Current deposition testimony concerning whether or not a dealer agreement in the name of Olsen was approved but not delivered. (Current Deposition, Vol. I, pp. 69-72, 84). Regardless of whether a dealer agreement was approved or not approved, Olsen has failed to produce evidence that preponderates in favor of believing that Progressive had any knowledge of the proposed dealership agreement or any involvement in Olsen's being denied a CBS dealership. The court finds that CBS had a policy during the times relevant which strongly favored dealers of CBS having their own repair facilities so that CBS customers could be given proper service. (Current Deposition, Vol. I, p. 35). During the period from 1971 to May of 1974, Olsen had no service facilities. (Transcript, Vol. II, p. 1724). Furthermore, it was not until April of 1974 that Olsen began operating his business on a full-time basis.[7] No other authorized dealers were appointed during the same period. It is reasonable to infer from the above facts that the denial of a dealership to Olsen was premised on CBS's independent business reasons and not on any conspiracy between CBS and Progressive, and the court so finds.[8]

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[7] This sentence was changed from the original to reflect correctly that Olsen went full-time in April of 1974, not in February of -1975.

[8] In the original version the last two sentences of this paragraph incorrectly stated that Olsen became a CBS dealer in 1975. In fact, Olsen has never been an authorized CBS dealer. The court mistakenly reached this conclusion because 1975 was the first year in which Olsen was able to acquire freely CBS products. This inadvertence by the court should in no way alter its decision on this point because the court's analysis, as based on this assumption, went only to the idea that he was able to more freely obtain products during and after 1975.

13. Progressive did not conspire to terminate Olsen as a dealer of CBS products. Olsen never became an authorized CBS dealer.[9]

[*Boycott*]

14. During at least part of the relevant period herein (specifically in 1972), CBS had a policy that its dealers were not to resell CBS products at wholesale to dealers not authorized by CBS. Margaret Current testified that Mr. Bull generally advised dealers that while CBS could not control where merchandise went after it was sold to authorized dealers, CBS would prefer that it not be sold to unauthorized dealers. (Current Deposition, Vol. I, pp. 47-48). However, the 1972-1973 CBS Fender authorized dealer agreement states: "2. Dealer agrees . . . . g. to resell Fender products at wholesale only to dealers who are authorized by Fender to sell Fender products." (Trial Exhibit P-186). Current stated that on occasion, CBS had traced serial numbers of CBS instruments from unauthorized dealers back to the authorized dealer who had transshipped the item. (*Id.* pp. 56-58). Mr. Bull testified similarly, adding that the service center did most of the tracing. (Bull Deposition, 46-47). The inference can be drawn that CBS's purpose in tracing serial numbers was to exert pressure on those dealers who were violating CBS policy.

There is also some evidence that CBS exerted pressure on transshipping dealers by creating "nonexistent credit problems" which had the effect of temporarily cutting off their supply of CBS instruments. (Current

[9] The original version erroneously stated that Olsen became an authorized CBS dealer in 1975. See footnote 8, supra.

Deposition, Vol. I, pp. 61-64). However, Current testified that she was unaware of any dealer who had his dealership terminated because of his willingness to transship. (Current Deposition, Vol. I, pp. 47-48). Furthermore, Doug Browne testified that if CBS had created any credit problems during the relevant period herein, those problems arose from the sale of a piano to a band in Wichita, Kansas. (Browne Deposition, Vol. V, pp. 1248-53).

The court finds that during the relevant period herein CBS had a policy that disfavored transhipment of CBS products to unauthorized dealers. The court further finds from the evidence that this was a nationally applied policy to protect individual CBS dealers such as Progressive and which was also based in part on the desire to minimize difficulties in handling warranty claims and to ensure that purchasers of CBS products had ready access to adequate repair service. (See Current Deposition, Vol. I, p. 59; Bull Deposition).

15. Progressive conspired with CBS and Herger to boycott Olsen from obtaining CBS products from Progressive, Browne, and Herger.[10] The court has found that an agreement existed between Progressive and Herger to fix CBS prices at levels higher than on the CBS price list, (see Finding No. 8). After careful reflection, the court finds that this agrement also ex-

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[10] The original version found no conspiracy to boycott. A further review of the evidence has compelled the court to the conclusion that Olsen has presented sufficient evidence, when viewed together in light of all the evidence presented at trial, to establish the conspiracy. A substantial revision of the original version Findings #15 and #16 has been made. New Finding #16 deals with damages arising from the boycot conspiracy.

tended to boycotting Olsen from obtaining CBS products. (Transcript, Vol. I, p. 215). As a further step of the conspiracy it was necessary to boycott Olsen in order that the high prices set by Progressive and Herger could be maintained and not be undercut by Olsen, who was selling CBS products at 85% of the suggested retail price.

The involvement of CBS in the conspiracy is made evident by Herger's testimony. She stated that the policy directing that she not resell Fender (CBS) products was "one and the same" with CBS and Progressive. (Transscript, Vol. I, p. 215). She further explained that the policy was one and the same "because I felt that Mr. Penman was dictating to Mr. Driver [the CBS representative for Utah] how things should run in Utah." (*Id.*) Herger stated that she handled the sale of one instrument to Olsen in the way she did, rather than in the traditional wholesale context, because of the price-fixing agreement. (Transcript, Vol. I, p. 220). She had previously had her supply of CBS instruments temporarily terminated for non-compliance with the price-fixing agreement. (*Id.* pp. 220-21).

Progressive has argued that Olsen never tried to buy CBS products from Progressive and only tried once with Herger. Nevertheless, the evidence has made clear that Olsen realized that such a request would be futile — as the one experience with Herger proved to be (in the sense that the difficulty involved and the high price charged by Herger made it unrealistic from a business standpoint to deal on that basis).

Both Progressive and Herger may have had their independent reasons for boycotting Olsen. Progressive was a direct competitor of Olsen and had a different

philosophy concerning pricing. Herger stated that she had an independent prejudice against giving competitive dealers large discounts. (Transcript, Vol. I, pp. 207; 223-26). Nevertheless, it is clear that Herger was in a different market area from Olsen so that she might have been amenable to deal with Olsen on occasion, but for the agreement with Progressive.

Doug Browne testified at the trial regarding a conversation with Robert Bull in early 1974 about Browne's shipment of CBS products to Olsen.

> Mr. Bull told me that he did not have the right to tell me who I could and could not sell to but that it was the desire of CBS to control its distribution through authorized dealers, at which time I said I had no desire to interrupt their distribution policies.
>
> So, he explained to me that based on dealings—
> Very briefly let me relate that: He told me that Clair Olsen was trouble. In fact, I believe the quote was "This guy is trouble."
>
> * * *
>
> Q. Did he elaborate on why he thought Clair Olsen was trouble?
>
> A. Not really. He just said that some of my merchandise had appeared there, and we didn't really get into it why or how he determined that some of my merchandise had appeared there, but the way that Fender traces the flow of their merchandise is known to most people, and they had evidently found that a serial number sold to me originally had appeared in Utah and that the logical way that it got there was by me selling it to Clair Olsen and that he would appreciate it if I would not interfere with their distribution policy,

> although again relating to me that he had no right to formally ask that, and at no time did he tell me not to sell to Clair Olsen.

(Transcript, Vol. V, pp. 1241-42). Browne also testified a few minutes later as follows:

> Well, as mentioned, in the discussion he advised me that Clair Olsen was not an authorized dealer and that he was trouble for authorized dealer or dealers that he had in the territory, and it was against his wishes that I sell them.

(*Id.* p. 1246). Browne also testified that the insinuation was made that if he continued to sell to Olsen, his supply would be cut off as before, so he stopped selling to Olsen for a period of one to one and a half years. (Transcript, Vol. V, pp. 1246-47). At that time, Herger and Progressive were the only authorized CBS dealers in Utah. After reivewing all the evidence together, the court is persuaded that Bull exerted pressure on Browne as a result of an agreement with Penman and as part of a broader policy to protect dealers such as Progressive. CBS's action toward Browne was consistent with CBS's actions toward him concerning similar sales on other occasions to dealers in other states. (See Daily Transcript, Vol. V, p. 1272, lines 1-3). This, however, does not significantly detract from the court's finding that CBS applied pressure to stop Browne from transshipping to Olsen pursuant to the wishes of Progressive.

[*Predatory Intent*]

As additional proof of the conspiracy, Olsen produced evidence at trial to prove that Progressive harbored a predatory intent toward competing dealers.

The inference Olsen would have the court draw from this evidence is that this predatory intent made it likely that Progressive conspired with CBS and other dealers to deprive Olsen of CBS products. The evidence in this regard involves four incidents. Concerning the first, Olsen testified that Penman telephoned him in 1972 and in effect threatened to put him out of business. However, he also testified that Penman said he did not intend to retaliate, but that Olsen should think things through carefully before proceeding with the lawsuit against Best. (Preliminary Injunction Transcript, pp. 40-41). Penman's testimony presented a different version — basically, that the conversation involved Penman's offer to help resolve a conflict between Olsen and Best. Olsen urges the court to draw an adverse inference against Progressive for its failure to call Best, who was present during the conversation and heard Penman's side of the conversation. Although Best's testimony may have cleared up some of the discrepancies, he was available as a witness to both parties and the court will not draw the adverse inference. On the whole, the court finds Penman's version to be more reliable. Even so, it does leave the court with some degree of evidence which might imply Penman had a predatory intent toward Olsen.

The second and third incidents presented by Olsen involved statements by Progressive to Jerrold McKean. In one, Penman indicated he was trying to get Fender guitars taken away from Mrs. Herger so that he could be the only major dealer in the area. In the other, he testified that Penman told him he was going to call the factory because evidently some guitars had been "shipped through by mistake" to Glenn Brothers Music. The court observes that McKean's testimony was impeached — revealing a prejudice against Penman arising

out of two lawsuits with Penman. (Transcript of May 4, 1979, pp. 9-12, 49-51). The fourth incident involves testimony of Michael Draper that he heard people at Progressive say that Progressive should stop buying products from ARP and Cerwin Vega because they were supplying Olsen. (Transcript, Vol. I, p. 2, lines 5-10; Transcript of April 30, 1979, pp. 71, 114). This last statement occurred after this suit was filed, however, and the record shows that during the relevant period, Progressive carried many of the same lines as Olsen. Furthermore, Olsen's own damage study shows that Progressive in fact continued to buy products from both ARP and Cerwin Vega after this incident occurred.

The above incidents do show a predatory intent on the part of Progressive, which lends support to many of the inferences drawn heretofore leading to the overall conclusion that a conspiracy to boycott Olsen existed among Progressive, CBS, and Herger. The scope of that conspiracy extended to prevent Olsen from obtaining product from at least Progressive and Herger during the damage period, and from Browne during a one and one-half year period beginning approximately in the spring of 1974.

[*Damages*]

16. Olsen has proposed a damage theory claiming lost profits caused by the boycott conspiracy. It is based upon Olsen's market share of CBS products in the Utah market during 1975, a base year in which Olsen had free access to CBS products. This share is then related back over the damage period years. The court finds the basic approach to be a reasonable one; however, several significant factors are not taken into account

by the proposed damage study. The court therefore adopts the study subject to the significant modifications described hereafter.

The court finds that Olsen has met his burden of proving the fact of injury. Inferences can be drawn that the boycott conspiracy foreclosed at least two avenues of supply, Herger and Browne, from which injury occurred. It is true that Olsen was apparently able to purchase CBS products from many sources at discounts as large as 60% of the list price. Olsen bought CBS instruments during the 1971-1975 period from BGK Enterprises, California Music, Leo's Musical Instruments, Freeport Music, and Bobby Music. (Transcript, Vol. VII, p. 1778; Exhibits P-241 to P-244). It is unclear from direct evidence the extent to which the conspiracy prevented Olsen from buying all the CBS products he otherwise would have bought — especially in light of other avenues available to Olsen from which he could obtain CBS products. The uncertainty arising from this factor is a burden the defendants must either clarify or bear. *Bigelow v. RKO Radio Pictures, Inc.* [1946-1947 TRADE CASES ¶ 57-445], 327 U.S. 251, 265 (1946).

[*Market Forces*]

Several market forces were in effect during the times relevant herein. During the early 1970's CBS products were in extremely high demand, and the evidence showed that the manufacturer had a difficult time keeping up with the demand. In about 1974-1975 the demand began to slacken due to the emergence of several other brands which began to compete effectively with CBS products. The year 1975 was also a somewhat less productive year economically for the market-

place in Utah. These observations would tend to make Olsen's damage study more conservative in the sense that potential sales for the product were more likely during the damage period. However, the periodical shortness of supply would have made it more difficult to obtain products from other dealers who would naturally prefer to sell the same item at full retail if supply is limited. Since these factors have not been quantified in the evidence and have the effect of cancelling each other out, no adjustment is made for them.

Prior to April 2, 1974, Olsen operated his business on a part-time basis, primarily during peak business hours. (Transcript, Vol. VIII, p. 1890). In late 1974 or early 1975 he moved his business to a larger store in Kaysville, Utah, which more than doubled his space. (Transcript, Vo. VIII, pp. 1894-96). The move was in the same general location, several doors down the street. Thus, during the base year, 1975, Olsen was operating in a substantialy different mode than during most of the damage period. The damage study of Olsen (Exhibit 248) does not adjust for this significant factor. The reason given is that Olsen would have made such a move earlier if CBS products had been freely available to him. The court rejects this assumption as too speculative.

It is necessary, therefore, to assign a value to the increase in Olsen's business in 1975 which would be attributable to the larger store and to his going full-time. No direct evidence on this point was introduced at trial. It is reasonable to infer, however, that these changes in operation must have had significant impact upon the business. In assessing the value of such impact, the court gives weight to the following factors: 1) Olsen had a viable business in operation with a developing clientele before the move; 2) selling time and

display space were basically doubled within the same basic location, and 3) other factors, except the boycott conspiracy, remained about the same. The court deems it a conservative estimate that 30% of total sales in the business in 1975 was attributable to the extra hours worked and the larger space of the new location. Accordingly, the sales of the base year, 1975, are diminished by 30% to reflect the role of the extra hours and space.

Another assumption of the damage study is that, but for the conspiracy, Olsen could have obtained CBS products at the authorized dealer cost, which was 50% of the retail list price (See Transcript, November 12, 1980, p. 102). This assumption is not supported by the evidence. Accordingly, an adjustment is made in the damage study to reflect that Olsen's purchases during the damage period would have been at 60% of list rather than 50%. This is accomplished by omitting lines 7 and 8 from Exhibit A-30.

The court finds that Progressive's Exhibit A-30 is the most accurate embodiment of Olsen's damage theory — as far as it goes — and therefore the court uses this exhibit as a reference point to make the above noted adjustments. This exhibit correctly employs 1975 *sales* of CBS products by Olsen (rather than purchases), which the parties stipulated were $27,000 for that year.

With the above adjustments in mind, the court finds that the damages resulting from the boycott conspiracy are determined as follows:

	1971	1972 (Dollars)	1973	1974	1975 (Base Year)	Line Item No.
Total Purchases of CBS Instruments in the State of Utah other than Plaintiffs' at Whlse. Value	$ 97,234	$86,806	$88,410	$ 97,922	$68,348	1
Plaintiffs' Sales of CBS Instruments Adjusted to Whlse. Value	$ 6,456	$ 4,489	$ 5,717	$ 10,612	$15,882	2
Total CBS Instrument Market at Wholesale Value	$103,690	$91,295	$94,127	$108,534	$84,230	3
Guitar City's Estimated Share of the CBS Instrument Market at Wholesale Value (18.86%)	$ 19,556	$17,218	$17,752	$ 20,469	0	4
Less: Adjustment Factor of 30% to Reduce Base Year to Equivalent of Part-time Operation	.70	.70	.70	.70	0	4a
and Half as much Selling Space	$ 13,689	$12,052	$12,426	$ 14,328	0	4b
Less: Plaintiffs' Sale of CBS Instruments Adjusted to Wholesale Value (Same as Line Item #2 Above)	6,456	4,489	5,717	10,612	0	5
Wholesale Value of Sales Lost Line 4b minus Line 5)	$ 7,233	$ 7,563	$ 6,909	$ 3,716	0	6
Plus: Guitar City's Average Mark-up on Transshipment Market	.3665	.3665	.4660	.4478	.5677	9
Instrument Purchase	$ 2,651	$ 2,772	$ 3,220	$ 1,664	0	10
Retail Value of Lost Sales	$ 9,884	$10,335	$10,129	$ 5,380	0	11
Less: Purchases-Transshipment Market Value (Cost)	$ 7,223	$ 7,563	$ 6,909	$ 3,716	0	12
Less: Additional Variable Expenses (10.65%) (Reduced by 20% from Exhibit A-30 in Accordance with Adjustment in Lines 4a and 4b above)	$ 1,602	$ 1,556	$ 1,579	$ 1,277	0	13
Net Income Loss	$ 1,059	$ 1,216	$ 1,641	$ 387	0	14

An explanation of the line item numbers can be found in Plaintiffs' Brief Regarding Damage Proof, filed October 2, 1980.

The foregoing formula yields a net loss of profit for the years of 1971 to 1974 of $4,303.

Conclusions of Law

1. The court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. §§ 1, 2, 15 (1976) (the monopoly claims have been dismissed pre-

viously); 28 U.S.C. § 1331 (1976). The parties have stipulated in the Pretrial Order that the court has jurisdiction over them.

2. Venue is properly laid in the Central Division of this court pursuant to 15 U.S.C. § 22; 28 U.S.C. § 1391 (1976).

3. The running of the statute of limitations was tolled by the filing of this action on April 18, 1975, and the relevant statutory period began on April 18, 1971. See 15 U.S.C. § 15b.

4. The interstate commerce requirement of 15 U. S. C. §1 is met by the facts of this case because the business of CBS, Olsen, Progressive, Herger and Browne involve interstate commerce within the meaning of that section. See *Hospital Building Co. v. Trustees of Rex Hospital* [1976-1 TRADE CASES ¶ 60,885], 425 U.S. 738, 743-46 (1976); *U. S. v. Cadillac Overall Supply Co.* [1978-1 TRADE CASES ¶ 61,892], 568 F. 2d 1078, 1082 (5th Cir.), cert. denied, 437 U.S. 903 (1978).

5. Based on its finding that Progressive and Herger agreed to divide territories and to fix high retail prices on CBS products, the court concludes that Progressive thereby conspired to restrain trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. ¶ 1 (1976). This is a *per se* violation since it involves price fixing. However, having found that Olsen suffered no injury as a result of the Progressive-Herger price fixing conspiracy, the court concludes that Olsen is not entitled to any damages on this conduct. See *Rea v. Ford Motor Co.* [1974-1 TRADE CASES ¶ 75,029], 497 F. 2d 577, 589 (3rd Cir. 1974).

6. In light of the court's findings that Progressive did not conspire with others to prevent Olsen from becoming a CBS dealer, or to terminate Olsen as a CBS dealer, the court rules that as to these various grounds Progressive has not violated Section 1 of the Sherman Act, and therefore is not liable for damages on these bases.

7. The court has found that Progressive conspired with Herger and CBS to boycott Olsen from receiving CBS products which caused Olsen to suffer a net loss of profits in the amount of $4,303 for the years 1971 to 1974.[11] The court concludes that Progressive thereby conspired to restrain trade or commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Under 15 U.S.C. § 15, Olsen is entitled to recover treble damages in the amount of $12,909 from Progressive, together with costs and a reasonable attorney's fee.

APPENDIX C

CONSTITUTIONAL AMENDMENT INVOLVED

The 5th Amendment provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[11] This conclusion has been changed from the original to reflect the court's finding that Progressive is liable for damages arising from a conspiracy to boycott Olsen.

The 14th Amendment provides: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ;nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 1 of the Sherman Act 15 U.S.C. § 1, provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act 15 U.S.C. § 2 provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine of not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Section 43(a) of the Lanham Act 15 U.S.C. 1125(a), provides: (a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or represen-

tation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

28 U.S.C. 1338 provides "(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws."

RULES INVOLVED

Rule 8(e) provides: (2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Rule 41(b) provides: For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 52(a) provides: (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58, and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the ex-

tent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusion of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

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APPENDIX D

WHOLESALE SALES VOLUME TO UTAH DEALERS OF FENDER AND RHODES PRODUCTS

	1973	1974	1975	1976	1977	Totals
		———— (Dollars) ————				
	(1)	(2)	(3)	(4)	(5)	(6)
Herger Music	$11,269	$18,719	$12,345	$ 7,574	$ 2,847	$ 52,754
Progressive Music	55,523	66,358	41,560	42,096	14,574	220,111
Cal's Music Box	—	—	—	5,614	5,603	11,217
Hart Brother	—	—	—	53,190	26,962	80,152
Lynn's Music	—	—	—	—	4,802	4,802
TOTALS	$66,792	$85,077	$53,905	$108,474	$54,788	$369,036
Progressives % of Total	83.13%	78%	77.1%	38.81%	26.6%	59.64%

Source: Year End Report, "Fender Domestic Sales In Dollars by Territory," 1973-1977.

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served three (3) copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, upon the following counsel of record:

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JUN 15 1983

DATED this .... day of ...., 1983.

Lowell V. Summerhays